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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY, Trustee of
International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

REPLY BRIEF FOR PETITIONERS

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Without attempting in this short reply, to answer all of the errors in respondents' opposition briefs, their more important claims can be answered as follows:

1. Their principal contention that the approval of this settlement was an *administrative matter purely,* concerning which no supporting findings of fact and conclusions of law were required, is clearly wrong.

A leading case on the point is *Macdonald v. Aetna Indemnity Company,* where the court, having jurisdiction of Aetna's receivership, had authorized the receiver to compromise Aetna's claims against Munich Reinsurance Company. Certain creditors of Aetna appealed, and the court said:

> "The receivers moved to erase this appeal, assigning as reasons: (1) that the order appealed from was not the proper subject of appeal, and (2) that the appellants were not entitled to take an appeal therefrom.
>
> In support of the first proposition it is alleged that an appeal could not be predicated upon the order *because it was not in the nature of a judgment, and did not involve the determination of any question of law or fact in issue, but was rather an order made in the exercise of the court's discretion in respect to a purely administrative matter.* The opinions of this court in *Guarantee, etc., Deposit Co. v. Philadelphia R. & N. E. R. Co.,* 69 Conn. 709, 714, 38 Atl. 792, and in *Links v. Connecticut River Banking Co.,* 66 Conn. 277, 283, 33 Atl. 1003, furnish a complete answer to these contentions. * * * See also *Trustees v. Greenough,* 105 U. S. 527, 531, as to the appealable character of the order."

In this case also, the Court outlined the issues which are presented for decision on settlement approvals, viz.:

> "The field of inquiry covers the subject of the probable validity of the claim made by the receivers, the apparent difficulties, if any, likely to attend an attempt to enforce it in the courts, the collectibility of a judgment obtained, the delays likely to be involved, the importance of these delays, the expense likely to be incurred, and the amounts involved in respect to both assured recovery and surrender.

"For the most part these are purely practical considerations. At points, however, some of them touch legal questions quite closely. This is particularly true of the matter of the validity of the claim which is the subject of the proposed compromise. That is an important factor in the situation. No intelligent conclusion, as to the wisdom or unwisdom of the proposed compromise, can be arrived at which does not take it into account. And yet the question of validity, important as it is, is not in issue. Its decision is not called for, and none could be made which could possess any other importance than as expressing a personal view. It would bind nobody, and conclude nothing. *The inquiry which the trial court was called upon to make had, and that which we are now to make has, no other purpose and possesses no other importance than the ascertainment in a general way of the probable or possible result of litigation of the claim.*"

Macdonald v. Aetna Indemnity Co., 88 Conn. 571.

See also the following cases to similar effect, viz.:

In re Ortiz Estate, 27 A. 2nd (Del. Ch.) 368;
Gordon v. Hartford Sterling Co., 319 Pa. St. 174.

The Macdonald-Aetna case was cited and followed by the Second Circuit Court of Appeals in *West v. Radio Keith Orpheum*, 70 Fed. 2nd (C. C. A. 2) 621 at 624.

The foregoing tests for judging a compromise settlement, present the issues involved, that is, the "subsidiary issues" of the case, as that term was used in the *Kelly-Everglades* case—319 U. S. 415 at 420.

And of course, it is only reasonable that receivership compromises, where substantial rights of the interested parties are concluded, should be treated on the same basis as other contested issues.

2. The point is made in some of the respondents' briefs that the Securities and Exchange Commission approved this settlement, to which special weight should be attached.

The fact is that the Commission did not make any independent study of its own, respecting the desirability of accepting the settlement. Mr. Yohalem, representing the Commission before the District Court, stated:

> "Now, the Commission has not undertaken to examine these claims, and therefore the Commission is not expressing a judgment on them; and it would seem to me that there would be no purpose served for this record to show any more specific analysis on my part, and it would be a purely personal analysis of the merits of the claims or the defenses. I of course cannot profess to be, and would not want to be taken in this court to be, an expert on the law applicable to the case" (R. 466).

(3) The point is also made by one of the respondents that all of Hydro's junior securities were sold to the Paper Companies and not directly to the public in any case. See particularly, Mr. Brickley's brief, pages 3 and 4. At top of page 4, it is stated that petitioners make no reference to the record in support of their statement that "the whole plan of Hydro's creation indicates the intent to make a public sale of Hydro's securities."

The record shows that Paper Companies in purchasing Hydro Class A stock, and reselling to the public, were acting as Hydro's agent for that purpose. (See letter, R. 279, 280.)

See also testimony of Mr. Archibald R. Graustein, the gentleman who was both president of Hydro and of the two Paper Companies at the time when Hydro securities were first issued, viz.:

"Q. Now when you authorized the issuance of Class A stock, wasn't it intended that if it became necessary to sell that stock for the purposes of the System, that the stock would be sold?

A. Yes.

Q. Now, I will go further and wasn't it intended to be sold, as you first intended to sell the Class A stock, by selling it to the public?

A. If I understand the question correctly, it was. That is the public was our natural market for the Class A stock" (R. 1582).

When the need arrived six months after Hydro's organization, for additional capital, 265,000 Class A shares were sold in September 1929 for $12,985,000. Hydro tried to interest underwriters for a direct sale to the public, but the underwriters were unwilling to make a firm commitment for more than 50,000 shares. Hence Paper group formed an underwriting organization, International Paper & Power Securities, Inc., which bought these 265,000 shares and then distributed same to the public (R. 276).

Again six months later, it was desired to issue still more Hydro capital stock, this time to buy in the bonds of United Electric Railways Company, a subsidiary of New England Power Association.

Evidently at this time, after the market crash in 1929, it was no longer feasible to sell Class A stock—so a security senior to the Class, A was created—the so-called $3.50 convertible preferred stock.

142,799 shares of convertible preferred were issued, of which 119,799 shares were issued in exchange for the bonds of United Electric, to the public direct without any intervening transfer to Paper Companies. Said bonds as thus acquired were then sold by Hydro to NEPA for $6,788,815.00—which sum was immediately taken out of

Hydro's pocket and turned over to Paper Company on the open account (R. 277).

The original sale of 475,000 Class A shares at Hydro's organization was consummated under an agreement between International Paper and Power Company whereby the latter, in capacity of underwriter, distributed the stock immediately to the public. Paper Company under this arrangement guaranteed Hydro a minimum price of $41.00 a share, *together with the payment to Hydro of any excess of Paper Company's sale proceeds, less expenses.* (Exhibit D in Exhibit 3-A, pages 2 and 3 in unprinted portion of the record.)

Under this distribution, many original certificates for various quantities of Hydro shares were issued directly to the public stockholders (R. 610).

4. Respondents also made the point that failure of the District Court to make findings of fact and conclusions of law was cured by the findings and conclusions contained in Appellate Court's opinion. The complete answer to this contention is the fact that the appellate court did not make any findings of the nature required of the District Court.

On the contrary, the Appellate Court decided the case "on the main question of whether it was within the discretion of the District judge to approve the settlement proposed" (R. 1724).

And after concluding that the settlement acceptance was a discretionary matter, the Appellate Court then affirmed, because—

> "Our consideration of the case convinces us that there was no abuse of discretion (*i. e.,* by the lower court) in so deciding" (R. 1735).

In reaching these conclusions, the Appellate Court decided the subsidiary points, first, that findings of fact and conclusions of law were not required of the lower court (R. 1736), and second, that if findings were required, then that the single recital in the judgment and decree was sufficient (R. 1735).

It is disclosed in our main brief and petition, that the Appellate Court was wrong on both these phases concerning findings and conclusions. Also that the presumptions on review of the validity of discretionary rulings below, cannot be indulged, absent sufficient findings and conclusions by the lower court to show factual basis of such discretion. As stated in the Kelly-Everglades Case—

> "We hold only that there must be findings, stated either in the Court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusions."
>
> 319 U. S. 415 at 422.

And so far as concerned specific findings on the several tests for evaluating compromises, the Appellate Court in no instance analyzed particular points nor indicated its views as to probable validity of Hydro's claim or defenses thereto. In fact the Court frequently said that it did not indicate any views on such points, *e. g.*, the following:

On jurisdiction over defendant's person, the Appellate Court said it was not inclined to accept the correctness of defendant's main argument "without exceedingly careful consideration" (R. 1731). But this point was not analyzed further with any reference to the particular facts and applicable law.

On the defense of laches and limitations, the Court said:

> "We give no expression of our views on the question whether the actions were timely brought" (R. 1732).

On the question of the Hydro entity cause of action under the Hayes-Georgian Case, 280 Mass. 10, the Appellate Court simply said:

> "Here again we are not called upon to answer the question" (R. 1733).

On the defenses of ratification as well as justification of these investments under the "business judgment" rule, the Appellate Court simply said:

> "We do not think that either the interest of the parties or the interest of the public would be benefited by further discussion of these points by this Court" (R. 1734).

In other words, no analysis of these and other critical points nor statement of the relevant facts of record, was made by the Court of Appeals.

Nowhere in this case have petitioners ever secured from any court, any considered findings of fact and conclusions of law upon the points for testing this compromise. The record contains abundant evidence of gross sharp practice and overreaching, perpetrated on Hydro by the International Paper Companies and their controlling stockholders, Chase National Bank of New York, the then Phipps family, etc. If this court does not allow the present review, the sordid book of Paper Companies' spoliation of its great public utilities subsidiary and thousands of investors therein, will be forever closed. For a comparative pittance, the Paper Companies will have escaped their just liabilities and the derelictions of big business, again condoned.

Respectfully submitted,

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